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No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. Respondents claim that the government would permit federal courts to sanction continuing violations of the Clean Water Act and thus, through the exercise of equitable discretion, modify the standards applicable to the discharger (Resp. Br. 29). To the contrary, as the government's opening brief clearly states, upon a finding of a violation of the Act, an appropriate remedy should be devised "to bring the violator into compliance with the requirements of the Clean Water Act as expeditiously as practicable" (Pet. Br. 18). The sole question presented in this case is whether the federal courts retain the discretion to formulate such a remedy without ordering

immediate cessation of the violating discharges for the period necessary for the remedial program to effect a cure.

We have never contended that the court may re-evaluate the statutory standards, much less ignore the statutory purposes. But the requirement that the court's equitable discretion must be exercised in light of the statutory purposes does not mean, as respondents suggest (Resp. Br. 24-25), that the court's discretion may be exercised only when there is no likelihood of a continuing violation, and that in all other situations the court must order the immediate cessation of the challenged conduct. Instead, as *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) make clear,[1] the court may properly conclude that allowing the violator a reasonable time to bring his conduct into compliance with the statutory requirements may be the best way of "'insuring better compliance in the future.'"[2]

In analyzing the remedial discretion of the federal courts in enforcing the Clean Water Act, the pur-

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[1] Respondents are incorrect in reading *Hecht Co.* v. *Bowles*, *supra*, and *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), as limited to situations in which the statutory violation has terminated. Indeed, the Court noted in *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 327, that the cessation of violations was not the controlling factor in its decision. Instead, that kind of rigid limitation on equitable discretion is precisely the sort of "major departure from * * * long [equitable] tradition" the Court there rejected. 321 U.S. at 329-330.

[2] That is certainly the situation here, where an immediate cessation order would require the Navy to obtain a presidential exemption from the statute, despite its readiness to seek a permit and thereby bring itself into compliance with the statutory requirements (see Pet. Br. 13 n.14).

poses and policies of the Clean Water Act—and not those of the Endangered Species Act—must be studied. For this reason, the court of appeals erred in applying a standard for remedial orders developed to satisfy the Endangered Species Act in *TVA* v. *Hill*, 437 U.S. 153 (1978). As the government noted in its opening brief, the differences in language, structure, and purpose of the two Acts justify different constraints on the equitable discretion of the courts in enforcing their mandates.[3]

2. Respondents attempt to justify the stringent restrictions on the district court's remedial discretion by asserting (Resp. Br. 35-36) that such limitations are necessary in order to induce dischargers to apply for a permit and conform to requirements of the Act prior to administrative or judicial enforcement. Respondents, however, overlook the alternative enforcement remedies available to district courts. In addition to equitable remedies, the Clean Water Act specifically provides for both civil and criminal monetary penalties. Section 309(d), 33 U.S.C. (Supp. III)

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[3] For that same reason, other cases on which respondents rely, *e.g.*, *Commodity Futures Trading Commission* v. *Hunt*, 591 F.2d 1211 (7th Cir. 1979), and *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973), do not support their position (Resp. Br. 25). *Hunt* and *Wilderness Society* each involved a statute or regulation that absolutely forbids certain types of conduct and did not, as in the case of the Clean Water Act, provide for the issuance of administrative permits to allow the conduct under appropriate circumstances. Only through cessation of the activities in question (in *Hunt*, maintaining excessively large speculative positions in the soybean futures market, and, in *Wilderness Society*, permitting the building of pipelines through federal lands on rights-of-way exceeding a certain width) could compliance with the law ever be achieved.

1319(d), provides for civil penalties of up to $10,000 for each day of violation. If the violation of the Act is deemed to be willful, Section 309(c)(1), 33 U.S.C. (Supp. III) 1319(c)(1), may be invoked to assess criminal penalties of from $2,500 to $25,000 per day of violation.[4] Thus, the Clean Water Act includes penalties specifically designed to induce prompt compliance with the provisions of the law; the equitable discretion of the district courts need not be hobbled to provide punishment for past failures of dischargers to achieve compliance. Instead, the equitable or injunctive remedy devised by the courts should be primarily aimed at achieving compliance with the Act in the future.[5]

Second, respondents contend (Resp. Br. 39) that an immediate cessation order must be entered by the district court in order to preserve the states' interests in maintenance of water quality. The argument appears to be that, since the states must certify an EPA-issued NPDES permit as conforming to state water quality standards (Section 401(a)(1), 33 U.S.C. (Supp. III) 1341(a)(1)), the courts are required to order immediate cessation of non-permitted discharges to vindicate the states' water quality interests. Water quality considerations may well lead a district court to order immediate cessation of non-

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[4] In addition, 33 U.S.C. (Supp. III) 1319(c)(1) provides for imprisonment of up to one year for willful violations of the Clean Water Act.

[5] A violator's past conduct, however, is a factor to be considered in formulating a remedy that will bring him into compliance in the future. Past unwillingness to conform to the requirements of the Act would suggest a more rigorous and more closely supervised remedial program to ensure that future compliance is achieved.

permitted discharges.[6] But, in the present case, the district court found, and the court of appeals affirmed the finding, that the Navy activity did not violate the applicable water quality standards (Pet. Br. 6-8).[7] Thus, respondents' argument would have this Court require the district court to enter an immediate cessation order to vindicate state interests that, on this record, have not been compromised.[8]

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[6] Even if water quality standards are found to be violated, immediate and total cessation of discharges may not be necessary to remedy the violations found. Depending upon the circumstances, limitations on discharges, short of total cessation, or other remedies, may be adequate to protect the states' legitimate interest.

[7] As explained in petitioners' opening brief (Pet. Br. 6 n.5), the Navy applied for an NPDES permit in December 1979. In December 1981, the Environmental Quality Board of the Commonwealth of Puerto Rico, a respondent in this case, denied the Navy a water quality certificate. The Navy has filed for reconsideration of this decision pursuant to Commonwealth law. As of this writing, the request for reconsideration is still pending. Should the Commonwealth authorities finally determine that a water quality certificate will not be granted for the NPDES permit, judicial review of the Commonwealth's determination may be pursued. In the meantime, once jurisdiction over the Clean Water Act remedy in this case is returned to the district court, the Commonwealth may find it appropriate to request additional relief in that court, based on this new determination, to vindicate their water quality interests.

[8] Respondents incorrectly suggest (Resp. Br. 38 & n.95) that recognizing the district courts' remedial discretion imposes an unfair burden on citizens seeking to enforce the Act's permit requirements, because it requires them to establish that the balance of equities favors an immediate cessation order. But we do not suggest that this burden falls on those seeking to enforce the Act. Here, the Navy established that the purposes of the Act, and the public interest, will best

3. The court of appeals' rationale for holding (Pet. App. 48a) that the district court lacked discretion in this case to enter any kind of remedial decree other than an immediate cessation order logically requires the same remedial inflexibility for *any* violation of Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), the Act's central prohibitory provision, which incorporates by reference restrictions in other sections of the Act. A brief survey of the broad range of possible violations of Section 301(a) demonstrates that this inflexibility would create immeasurable hardship, cause wholesale disruption of efforts to administer the Act, and require a sharp break with a settled administrative and judicial practice of shaping curative decrees responsive to the consequences and other circumstances of the violation.

At one extreme are ongoing activities which could be shut down only with great damage to national interests and for which federal and state agencies have developed no permit standards, either because the activities, as in the present case, are unique operations producing discharges that apparently have no appreciable negative impact on the waters in question or because, as in a recent district court case, the activities were long regarded as falling outside the Act's coverage. In a case exemplifying the latter circumstances, *National Wildlife Federation* v. *Gorsuch*, Civ. Action No. 79-0915 (D.D.C. Jan. 29, 1982), the district court has held that existing dams are "point sources" (see 33 U.S.C. (Supp. III) 1362 (14)) that must be regulated under the NPDES

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be served by permitting a reasonable time for the achievement of compliance with the Act. The question is only whether the district court retains the discretion to make that decision on a proper showing by the discharger.

permit system (see 33 U.S.C. (& Supp. III) 1342). That ruling is contrary to the views of the federal government, which had previously classified dams as non-point sources; but if the ruling is sustained, the owners and operators of hundreds of thousands of dams throughout the country may find themselves in violation of Section 301(a) of the Clean Water Act for discharging pollutants from a point source without an NPDES permit.[9] An active permitting program would, in time, cure such violations. But, in the meantime, the dam owners and operators would be in the position the Navy finds itself in here: waiting for the pollution control agencies of the federal government and the states to devise permit requirements and process permit applications respecting an activity not previously regulated under the Act.

At the other end of the spectrum are activities in violation of the Act for which immediate cessation orders are essential. For example, activities involving the filling of wetland areas, regulated under Section 404 of the Act, 33 U.S.C. (Supp. III) 1344, are typically subject to administrative cease and desist orders; and when these are unavailing, preliminary and permanent court injunctions against filling without a Section 404 permit are sought. Such remedies

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[9] The district court acknowledged that there are more than two million dams in the country, of which 50,000 to 60,000 are "large dams," *i.e.*, those at least 25 feet high with a storage capacity of 15 acre-feet or those at least six feet high with a storage capacity of more than 50 acre-feet. *National Wildlife Federation* v. *Gorsuch*, *supra*, slip op. 34 & n.78. The NPDES permit requirement would apply to all dams that do or may discharge pollutants, and the district court was apparently unable to estimate how many that might be, suggesting only that some might be dealt with by areawide or general permits. Slip op. 34.

are pursued because the deposit of fill in wetlands alters the character of those lands and prevents them from performing their function in the hydrological cycle, and because once the fill has been placed, complete restoration of the wetlands may be neither technologically feasible nor financially practicable. See, *e.g.*, *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976). In such cases, the congressional objective of preventing the destruction of wetlands (see 4 *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 869, 920 (1977)) would be frustrated by a failure to order immediate cessation of the activity.

The most typical violation of Section 301(a) of the Clean Water Act, however, involves a discharger's failure to comply with the terms of its NPDES permit. Although in some of these cases, an immediate cessation order may be warranted, the usual administrative and judicial response has been to establish a schedule setting out a phased program to bring the violator back into compliance with its permit and the Act.[10] The sewage treatment facilities in Puerto Rico and many major cities throughout the Nation, including New York, Philadelphia, and Washington, D.C., have been subjects of such compliance schedule orders rather than orders of the kind required under the theory of the court below, which would mandate immediate cessation of the discharge of the treated sewage of those areas into waters of the United States. See *City of Philadelphia* v. *EPA*, Civ. No. 78-878 (E.D. Pa. Sept. 25, 1979); *United States* v. *Puerto Rican Aqueduct and Sewer Authority*, Civ.

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[10] Such a compliance schedule may also be supplemented by monetary penalties pursuant to Section 309(c)(1) and (d) of the Act, 33 U.S.C. (Supp. III) 1319(c)(1) and (d).

No. 78-38 (D.P.R. Feb. 27, 1978); *United States* v. *City of New York*, 77 Civ. 76 (S.D.N.Y. Mar. 1, 1977); *State Water Control Board* v. *Washington Suburban Sanitary Commission*, Civ. No. 1813-73 *et al.* (D.D.C. July 29, 1974).

In sum, the past response to violations of Section 301(a) of the Clean Water Act has not been automatic entry of an immediate cessation order. The nature of the remedy devised is dependent upon the nature of the violation and its relationship to the purposes of the Clean Water Act. Only one feature of the remedial response is automatic and mandatory: that the remedial order be designed to bring the violator into compliance with the Act's requirements within a reasonable time.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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